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No. 83-840

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

ROBERT BOYKIN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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OPPOSITION ON BEHALF OF RESPONDENTS TO PETITION FOR A WRIT OF CERTIORARI

RICHARD B. SOBOL
(Counsel of Record)
MICHAEL B. TRISTER
ABOUREZK, SOBOL & TRISTER
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 775-5960

JAMES E. YOUNGDAHL
YOUNGDAHL & LARRISON
2101 Main Street
Little Rock, Arkansas 72206

DANNY E. CUPIT
CUPIT & MAXEY
P.O. Box 22666
Jackson, Mississippi 39205
Attorneys for Respondents

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STATEMENT OF CASE

The facts relevant to this Opposition are included in the Reasons Why the Writ Should Not Be Granted.[1]

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. No Important Question of Law is Raised in the Petition.

The first two questions presented by the Petition are whether the court of appeals correctly applied this Court's decision in *Pullman-Standard Co. v. Swint*, 456 U.S. 273 (1982), regarding the "clearly erroneous" standard of Rule 52, F. R. Civ. P. The question of whether *Swint* was properly applied in a particular case is not a question of general importance warranting review by this Court, even if it did arise in this case. But see Part 2,

[1] It should be noted that the opinion of the United States District Court for the Northern District of Mississippi in *EEOC v. Georgia-Pacific Corp.*, reprinted as Appendix D to the Petition, is an unrelated case not involving the sawmill in Columbia, Mississippi that is the subject of this action. See A79-A80. ("A——" citations refer to the Appendix to the Petition.)

infra. Nor does the question of class certification presented by the Petition involve any significant legal issues that would warrant the exercise of *certiorari* jurisdiction. See Part 4, *infra*.

2. The Court of Appeals Did Not Overturn Any Findings of Fact.

The Petition proceeds on a mistaken premise. The court of appeals did not overturn any factual findings of the district court. That there is no issue in this case of the application of Rule 52 is made clear by a review of the evidence and the decisionmaking below.

Plaintiffs' class claim is that black employees at the defendant's sawmill in Columbia, Mississippi are discriminatorily excluded from the higher-paying jobs.[2] In support of this claim, plaintiffs introduced statistical evidence that showed, over the six-year period from the opening of the plant in 1970 to the close of discovery in 1976, that a disproportionately small number of black employees at the sawmill had been assigned to work at the higher-paying jobs.[3] Expert testimony showed that

[2] There are 60-70 hourly employees on a single shift at defendant's sawmill. About one half of these jobs are "utility" positions, and these are the lowest-paid jobs in the sawmill. A31, 40. In this Opposition, plaintiffs use the phrase "higher-paying jobs" to refer to all of the jobs at the sawmill other than the utility job.

[3] The following Tables reflect the initial assignment and the promotion of employees by race over the six-year period, 1970-1976.

Table I

Number and Percentage by Race of Employees
Whose Initial Assignment Was Above the Utility Position

Race	Total Number Employed	Number Initially Assigned Above Utility	Percentage Initially Assigned Above Utility
White	444	90	20.3%
Black	317	22	6.9%

[Footnote continued on page 3]

the statistical disparities were significant to a high degree and sufficient to raise an inference of discrimination under the standards later approved by this Court in *Castaneda v. Partida*, 430 U.S. 482, 496, n.17 (1977), and *Hazelwood School District v. United States*, 433 U.S. 299, 311, n.17 (1977). See 706 F.2d at 1391, n.3, A15, n.3.[4]

[Continued]

Table VI

Number and Percentage by Race of Employees in the Utility Position Who Were Promoted to Higher-Paying Job

Race	Number of non-probationary employees whose initial assignment was in Utility	Number who were promoted out of Utility	Percentage who were promoted out of Utility
White	178	84	47.2%
Black	157	42	26.8%

All of plaintiffs' statistical evidence is reprinted in the opinion of the court of appeals, at A9-A13. There was no dispute with respect to the accuracy of the figures in plaintiffs' statistical calculations. 706 F.2d at 1391, A16.

[4] Plaintiffs bolstered the statistical evidence of discrimination in several respects:

"According to the testimony of defendant's Plant Manager, prior experience or education outside the sawmill was not necessary to the assignment to the better-paying jobs. These jobs could be learned and were learned through on-the-job training. The testimony of the Plant Manager on this point is reprinted in the opinion of the court of appeals, 706 F.2d at 1392, n. 5, A17-A18, n. 5.

"There was no system of notification within the plant of the availability of higher-paying jobs, and no procedure for applying for a higher-pay job. There were no established qualification or experience requirements. All employment decisions were made by white supervisors in their subjective discretion. 706 F.2d at 1386.

[Footnote continued on page 4]

The Magistrate who tried and decided the case found that plaintiffs' evidence did not establish a *prima facie* case of class-wide discrimination because of two problems he perceived in plaintiffs' statistical evidence. First, he ruled that the work force at defendant's sawmill was too small to permit useful statistical analysis. A67. Second, he ruled that the statistical evidence did not give rise to an inference of discrimination because it did not properly account for differences in the qualifications of white and black employees. A41, A67. The Magistrate further found that any inference of discrimination that did arise from plaintiffs' evidence was rebutted by defendant's evidence bearing on specific assignment decisions. A57.

The court of appeals rejected each of these conclusions of the Magistrate. With respect to the statistical evidence, the court of appeals held that the proper focus was not the size of the defendant's work force at any single time, but the number of assignment decisions within the period covered by the suit, and that the number of observations and the size of the disparities reflected in plaintiffs' tabulations were sufficiently large to give rise to an inference of discrimination. See pp. 6-7, *infra*. The court of appeals further found that, because prior related experience was not necessary to assignment to the higher-paying jobs at the sawmill, the statistical evidence gave rise to an inference of discrimination with-

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[Continued]

A6. See also Pl. Exh. 41, pp. 25-33 (Deposition of Plant Manager); Tr. 1026-32 (Trial testimony of Plant Manager).

* There was testimony from sixteen black employees as to their difficulties in securing a higher-paying job in the plant, and there was evidence of favoritism for white employees, frequently based on family or personal relations. See 706 F.2d at 1386, A6. And most significantly, the Plant Manager—the official with the principal role in making job assignments at the sawmill—testified to his belief that blacks were not suitable for and did not want more responsible positions. His testimony in this regard is reprinted in the opinion of the court of appeals, 706 F.2d at 1390-91, A14-15.

out reference to possible differences in qualifications. See pp. 8-9, *infra*. Lastly, the court of appeals held that the number of specific job assignments considered by the Magistrate—even assuming the correctness of his conclusion that these assignments were shown to be nondiscriminatory—was too small to overcome the inference of discrimination that arose from plaintiffs' evidence. See pp. 9-10, *infra*.

The correctness of the decision of the court of appeals on these questions is discussed in Part 3, *infra*. What is significant here, in terms of the question purportedly presented by the Petition, is that the court of appeals overturned conclusions of law, not findings of fact.

In arguing that the court of appeals did reverse factual findings in violation of the teaching of this Court's decision in *Swint*, defendant claims that here, just as in *Swint*, the court of appeals reversed a lower court finding that there was no intent to discriminate. But the two situations are not the same.

Swint involved the application of Section 703(h) of Title VII which immunizes a seniority system from liability under the Act, even if it perpetuates past discrimination or has a disproportionate adverse impact on a protected group, unless the plaintiff proves that the seniority system was adopted with the intention to discriminate on a prohibited basis. See generally *Teamsters v. United States*, 431 U.S. 324, 349-353 (1977). Intent to discriminate in the adoption of a seniority system cannot be inferred from the fact of disparate impact; plaintiff must adduce evidence that is probative of actual discriminatory motivation. *Pullman-Standard Co. v. Swint*, 456 U.S. at 289. In *Swint*, this Court held that whether such motivation exists is a pure question of fact to which Rule 52 applies.

The case at bar does not involve a seniority system. Rather, plaintiffs alleged class-wide disparate treatment of blacks in assignments to upper-level jobs at defend-

ant's sawmill. This Court has held that a *prima facie* case of class-wide disparate treatment, including the element of intent to discriminate, is established by proper statistical evidence that shows significant disparities adverse to a protected group. *Teamsters v. United States*, 431 U.S. at 339; *Hazelwood School District v. United States*, 433 U.S. at 307. Similarly, a *prima facie* case of individual disparate treatment, including the element of intent to discriminate, is established by proof of the four elements set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). A district court's refusal to find a *prima facie* case of discrimination, in either a class or individual action, when the facts identified by this Court as establishing a *prima facie* case have been proved, is not a factual finding protected by Rule 52.

3. The Decision of the Court of Appeals on the Legal Questions Presented Was Fully in Accord With the Decisions of This Court.

A. The Number of Employee Assignments Reflected in Plaintiffs' Statistical Evidence Was Large Enough for Significance.

Plaintiffs' statistical tabulations with regard to the initial job assignments of new employees included initial assignment information for 761 new hires. It showed 112 initial assignments to upper-level jobs. Plaintiffs' statistical analysis regarding promotions included information for 335 employees. It showed 126 promotions to upper-level jobs.[5]

In holding that the disparities shown in plaintiffs' tabulations were sufficient to give rise to an inference of discrimination, the court of appeals relied on the methodology adopted by this Court in *Castaneda v. Partida*, 430 U.S. at 496, n.17, and applied to actions under Title VII

[5] See note 3, supra.

in *Hazelwood School District v. United States*, 433 U.S. at 311, n.17.[6]

> Plaintiffs' reliance on statistical evidence to prove a *prima facie* case of racial discrimination requires us to judge the statistical significance of the disparities charted above. Fortunately, the methodology to be utilized in arriving at this answer is clearly set out in *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). A binomial distribution statistical analysis of Tables I (initial assignment data) and VI (promotion data) demonstrates the statistical significance of the difference between the actual and expected number of blacks who received favorable initial assigments/promotions.

706 F.2d at 1391, A15. Footnote 3 to the opinion of the court of appeals sets out the mathematics for the approved binomial distribution statistical analysis for Tables I and VI. The determination of significance necessarily includes consideration of the number of observations involved.

B. Where Prior Qualifications Are Not Required, Statistical Evidence Need Not Include Qualifications to Raise an Inference of Discrimination.

The Magistrate also thought that plaintiffs' Tables I and VI were insufficient to raise an inference of discrimination because they did not account for possible differences in the qualifications of black and white employees. A67.[7]

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[6] Defendant's argument, Petition, pp. 13-15, that a binomial distribution analysis is acceptable in jury selection cases, but not in employment discrimination cases, is foreclosed by this Court's decision in *Hazelwood School District v. United States*, which is not cited in the Petition.

[7] Plaintiffs did introduce statistical evidence that was standardized for prior experience. In preparing these exhibits, the relevance of each individual's prior experience, as shown on his employment application, was determined according to objective standards developed by plaintiffs' counsel. See 706 F.2d at 1391, & n.4, A17 & n.4.

[Footnote continued on page 8]

At trial, the Manager of the sawmill testified that there were no prior experience requirements for assignment to the upper-level jobs at the plant and that employees learned how to do these jobs through on-the-job training. See 706 F.2d at 1392, & n.5, A17-18 & n.5. In holding that the Magistrate had erred in rejecting plaintiffs' statistical evidence for failure to consider pre-employment qualifications, the court of appeals relied directly on the decisions of this Court in *Teamsters v. United States* and *Hazelwood School District v. United States.*

> Defendant points to a line of cases in which the failure to standardize data for qualifications was judged fatal to the plaintiffs' statistical case. E.g., *Pouncy v. Prudential Ins. Co.*, 668 F.2d 795 (5th Cir. 1982); *Rivera v. City of Wichita Falls* [,665 F.2d 531 (5th Cir. 1982)]. Unlike the case at bar, however, those cases considered jobs involving skills not generally possessed or readily acquired by the general population. The Supreme Court, in *Hazelwood School District v. United States*, set forth the reason that the two types of cases must be viewed differently.
>
> > In *Teamsters*, the comparison between the percentage of Negroes on the employer's work force and the percentage in the general areawide population was highly probative, because the job skill there involved—the ability to drive a truck—is one that many persons possess or can fairly readily acquire. When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the

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[Continued]

These exhibits, which appear as Tables II, V, VII and IX in the opinion of the court of appeals, 706 F.2d at 1388-90, A10-A13, confirm the inference of discrimination.

Defendant took the position at trial that plaintiffs did not correctly determine what sort of prior experience is relevant to work in a sawmill, but it did not produce any alternative statistical analysis that would reflect its own view of relevant prior experience.

> smaller group of individuals who possess the necessary qualifications) may have little probative value.
>
> 433 U.S. at 308 n.13. Since the plant manager plainly stated that all but one of the jobs could be learned on the job, . . . qualifications need not be considered in making an accurate statistical picture.

A19-20.

C. The Evidence on Which the Magistrate Relied Was Too Narrow to Overcome the *Prima Facie* Case.

The Magistrate reached the conclusion that any inference of discrimination that arose from plaintiffs' proof had been overcome on the basis of evidence adduced by the defendant that identified the individuals who had worked in the jobs in which few or no blacks had worked.[8] In many instances, there was no evidence or finding that these whites possessed any special qualifications for these jobs, and no explanation as to why they had been so assigned. A44-A55. In the course of this discussion, the Magistrate examined a small handfull of specific selection decisions as to which black employee witnesses had alleged discrimination, and found that these were all non-discriminatory. *See* A47, A49, A54.[9]

In reversing, the court of appeals held that evidence concerning a few assignments was legally insufficient to overcome a *prima facie* case that includes statistical evidence bearing on hundreds of employment decisions.

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[8] Plaintiffs' Table III listed eighteen higher-paying jobs in which a total of 78 whites and no blacks had worked. 706 F.2d at 1388, A10. More than 40% of the persons employed at the sawmill were black. A31.

[9] With respect to the instances in which the Magistrate found a particular assignment decision to be non-discriminatory, plaintiffs argued in detail and at length on appeal that the findings were clearly erroneous and should be overturned. The court of appeals did not address this argument because it found that evidence relating to the filling of a few vacancies was inadequate to overcome the *prima facie* case, regardless of the correctness of the Magistrate's findings relating to these vacancies.

> [Defendant presented] evidence about a few of the promotion decisions and why blacks were not placed in these positions. This attempt to combat a *prima facie* case with evidence about a handful of promotion decisions is doomed to failure because a *prima facie* case of class-wide discrimination "is not met by [defendant's] attempts to parry specific allegations of alleged discrimination. . . ." *United States v. Hayes International Corp.*, 456 F.2d 112, 120 (5th Cir. 1972). . . .

706 F.2d at 1393, A20. Defendant acknowledges that this correctly states the applicable legal principles. Petition, p. 9.

4. The Court of Appeals' Decision on Class Certification Is Correct.

The case was filed as a class action in August 1973. On December 27, 1974, the district court certified the case as a class action on behalf of present and former black employees for purposes of discovery and trial, and ordered that notice of the action be mailed to each member of the class.[10] Discovery was conducted on a class-wide basis, the class issues were fully explored at trial and were decided by the Magistrate.

In his Recommendation, the Magistrate ruled that the class should be decertified because of "lack of a proper representative of the alleged class and the absence of proof of sufficient numerosity to necessitate the filing of a class action." A61. With respect to the first point, the Magistrate cited plaintiffs' status as former employees. A62. With respect to the latter, the Magistrate stated that the sixteen employee witnesses who testified at trial could have each brought their own action. A62-63.

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[10] The Petition, p. 4, is in error in stating that the original tentative certification was by the Magistrate. In fact, it was entered by Judge Russell on December 27, 1974. The Magistrate was appointed as Special Master on March 30, 1976, and had no prior involvement with the case.

The individual plaintiffs are black men who were hired by defendant and assigned to the lowest-paid classification at the sawmill. During their employment with the defendant, neither was able to secure a promotion to a higher-paid job. Individually, they claim to be victims of defendant's policy of racially discriminatory initial assignments and promotions. Thus, there is a complete identity between the individual and class claims. The case presents no question of a representative raising claims different from his own. *Compare General Telephone Co. v. Falcon*, 457 U.S. 147 (1982).[11]

Plaintiffs' status as former employees in no way undermines the propriety of their representation. To the contrary, former employees comprise a substantial majority of the members of the class.[12] No question has ever been raised as to the adequacy or vigor of plaintiffs' representation of the class as originally certified by Judge Russell nine years ago.

With respect to numerosity, the Magistrate counted the number of witnesses, instead of the number of individuals affected by the challenged employment practices. Plaintiffs proved that 295 blacks were assigned to utility positions from 1970 to 1976.[13]

The Magistrate's Recommendation for class decertification was manifestly erroneous and its reversal by the court of appeals was proper in all respects.

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[11] The Magistrate recommended dismissal of both the individual and class claims. After reversing the Magistrate's disposition of the class claims, the court of appeals held that "[t]he named plaintiffs, as every other black employee in the class, are entitled to the presumption that arises from the finding of discrimination and should be entitled to make a claim for back pay and other relief." 706 F.2d at 1394, A22-23. Thus, this is not a case in which a plaintiff whose individual claim has been determined to be without merit is permitted to represent a class. *Compare East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

[12] See note 3, *supra*; A31.

[13] See note 3, *supra*.

CONCLUSION

The defendant has failed to identify any question that would warrant the exercise of *certiorari* jurisdiction by this Court. The Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

RICHARD B. SOBOL
(Counsel of Record)
MICHAEL B. TRISTER
ABOUREZK, SOBOL & TRISTER
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 775-5960

JAMES E. YOUNGDAHL
YOUNGDAHL & LARRISON
2101 Main Street
Little Rock, Arkansas 72206

DANNY E. CUPIT
CUPIT & MAXEY
P.O. Box 22666
Jackson, Mississippi 39205
Attorneys for Respondents

Dated: December 14, 1983